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AMARAPATHI PERIASAMY

v.

MUNIANDY PERIASAMY

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FEDERAL COURT, PUTRAJAYA
SITI NORMA YAAKOB CJ (MALAYA)
ARIFIN ZAKARIA FCJ
NIK HASHIM FCJ
[CIVIL APPEAL NO: 02-18-2005 (M)]

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15 JUNE 2006

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FAMILY LAW: *Children - Custody - Right to custody of 12-year old child - Section 88(1) Law Reform (Marriage and Divorce) Act 1976 - Whether word 'relative' appearing in that sub-section empowered court to grant a custody order to appellant in her capacity as a foster parent - Timing of custody application - Preference of child - Welfare and future of child - Whether it was in child's best interests to remain with her natural parents*

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The dispute in this appeal was a family dispute centred on the right to custody of a 12-year old minor ('the child'), the daughter of the respondent and the niece of the appellant (the respondent's younger sister). When the child was only three and a half years old, the respondent had surrendered care and custody of the child to the appellant in the belief and hope that by taking care of the child, the appellant would be able to conceive a child of her own. That did not happen and for over 11 years, the appellant cared for the child as her own. The appellant and her husband took the child to meet with the child's natural parents and siblings during the Deepavali celebration of 2004, and the child was persuaded to stay back with her family with a promise that she would be returned to the appellant. However, the child was not returned and to enforce her parental rights, the appellant turned to the courts seeking a number of reliefs the practical effect of which would be to restore custody of the child to her. The High Court dismissed the appellant's application for custody and the Court of Appeal also dismissed the appellant's subsequent appeal against the decision of the High Court. In this appeal, the appellant chose to submit on the provisions of s. 88(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act') to support the contention that the word 'relative' appearing in that

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sub-section empowered the court to grant a custody order to the appellant in her capacity as a foster parent. The appellant contended that there were exceptional circumstances to warrant the making of such an order.

Held (dismissing the appeal)

Per Siti Norma Yaakob CJ (Malaya):

- (1) The introductory words “The court may at any time by order ...” in s. 88(1) of the 1976 Act is a giveaway in that there must be a pending custody battle between the parents of a child, and that the court is asked to determine which parent has the better right to custody at the expense of the other. The subject matter of the dispute is the child of the marriage, which under s. 2 of the 1976 Act is defined to include a child legally adopted by either of the warring parties before the court, and it is when the court finds that the responsibility of custody cannot be given to either parent due to exceptional circumstances prevailing in any given case that the court turns to a relative to whom custody can be entrusted. The factual matrix of the instant appeal did not fall within the framework of the sub-section. The custody battle was not between the natural parents of the child but between her aunt and her father. The appellant could not claim to fit into the shoes of a parent as the 1976 Act made no provision as to the custodial right of a foster parent, which the appellant claimed to be. (paras 14, 15 & 16)
- (2) As for the timing of a custody application, it can be applied for by either parent at any time under s. 88(1) of the 1976 Act and this is confirmed by the case of *R Saraswathy v. R Palakrishnan*. The applicant parent need not wait for matrimonial proceedings to commence before the application is made. To that extent, the finding of the High Court judge that a custody order under s. 88(1) of the 1976 Act can only be obtained where the parents have commenced matrimonial proceedings against each other is erroneous. (para 17)
- (3) An interview with the child for the purpose of ascertaining which party she preferred to spend her future life with revealed a candid choice by the child to be with her parents and siblings. In issuing an order affecting the welfare and the future of a minor, a court is mindful of the well-entrenched principle of law that the principal consideration is the welfare

- A of the minor. The child had been living with the parents and siblings for the past one and a half years and although the respondent was a bread seller, there was nothing to suggest that he was unable to support his non-working wife and his four school-going children. (paras 21, 22, 23 & 24)
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- (4) The respondent was the natural father of the child and when he parted with her in 1994 and allowed the appellant to nurture and care for the child, it was with the fervent belief, however misguided, that the appellant would be blessed with an issue of her own. As such, the surrender of the child to the appellant lacked the element of permanency. This was also borne out by the fact that no attempt had been made by the appellant to formally and legally adopt the child. As more than 11 years had passed and she had yet to conceive a child of her own, it was only right and proper that the child be returned to her natural parents where she would be able to lead a more fulfilling life, surrounded by the love and affection of her own parents and the companionship of her own siblings. (para 25)
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- E (5) Based on those considerations and that the appellant had no right in law to force the respondent to return the child to her, the appeal was dismissed with costs and the deposit was to be paid out to the respondent in full and final settlement of his costs. (para 26)
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Bahasa Malaysia translation of headnotes

- Rayuan di sini melibatkan pertikaian keluarga yang berpaksi pada hak jagaan seorang kanak-kanak berumur 12 tahun ('kanak-kanak'), yang merupakan anak perempuan responden dan anak saudara kepada perayu (adik perempuan responden). Sewaktu kanak-kanak berumur tiga setengah tahun, responden menyerahkan jagaannya kepada perayu dengan kepercayaan dan harapan bahawa, dengan penjagaan kanak-kanak tersebut, perayu kelak akan berjaya mengandungkan anaknya sendiri. Itu tidak berlaku dan untuk 11 tahun berikutnya perayu telah menjaga kanak-kanak seperti anaknya sendiri. Pada perayaan Deepavali tahun 2004, perayu dan suaminya telah membawa kanak-kanak ke rumah keluarga kandungnya di mana kanak-kanak telah dipujuk oleh keluarga kandungnya untuk tinggal dengan mereka buat sementara waktu sebelum dipulangkan kepada perayu. Kanak-kanak, bagaimanapun, tidak dipulangkan ke pangkuan perayu. Berikutnya, perayu memohon beberapa relif tertentu dari mahkamah khususnya
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bagi mendapat hak jagaan ke atas kanak-kanak. Mahkamah Tinggi menolak permohonan perayu untuk hak jagaan dan keputusan tersebut kemudian disahkan oleh Mahkamah Rayuan. Dalam rayuannya di sini, perayu memilih untuk berhujah atas peruntukan s. 88(1) Akta Memperbaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976') bagi menyokong hujahnya bahawa perkataan 'relative' di sub-seksyen tersebut memberi kuasa kepada mahkamah untuk memberi perintah jagaan kepada perayu dalam kapasitinya sebagai ibu bapa angkat. Menurut perayu, terdapat halkeadaan luar biasa di sini bagi mewajarkan perintah sedemikian.

Diputuskan (menolak rayuan)

Oleh Siti Norma Yaakob KH (Malaya):

(1) Kata-kata pengantar yang berbunyi "Mahkamah boleh pada bila-bila masa melalui perintah ..." di dalam s. 88(1) Akta 1976 adalah suatu 'giveaway' dalam erti kata harus wujud satu pertikaian mengenai jagaan di antara kedua ibu bapa kanak-kanak, dan bahawa mahkamah telah diminta untuk memutuskan siapakah di antara mereka yang mempunyai hak yang lebih kukuh terhadap jagaan dan berhak diberi hak jagaan. Subjek pertikaian adalah kanak-kanak dari perkahwinan, yang mana, di bawah s. 2 Akta 1976, ditakrifkan sebagai termasuk kanak-kanak yang dijadikan sebagai anak angkat oleh mana-mana pihak yang bertikai. Bagaimanapun, hanyalah dalam keadaan di mana mahkamah mendapati tanggungjawab jagaan tidak boleh diberikan kepada mana-mana ibu bapa disebabkan oleh halkeadaan luar biasa yang wujud dalam sesuatu kes, bahawa mahkamah akan berpaling kepada saudara mara kanak-kanak bagi memberikan hak jagaan kepada mereka. Kedudukan fakta kes semasa tidak dirangkum oleh ruang litup sub-seksyen ini. Pertikaian jagaan bukan di antara kedua ibu bapa kandung kanak-kanak tetapi adalah di antara emak saudara dan bapanya. Perayu tidak boleh berkata bahawa beliau harus dianggap sebagai seorang ibu bapa kerana Akta 1976 tidak membuat apa-apa provisi mengenai hak jagaan ibu bapa angkat sepertimana tuntutananya.

(2) Mengenai masa untuk membuat permohonan hak jagaan, ia boleh dipohon oleh mana-mana ibu bapa pada bila-bila masa di bawah s. 88(1) Akta 1976 seperti yang disahkan oleh kes *R Saraswathy v. R Palakrishnan*. Ibu bapa/pemohon tidak perlu menunggu prosiding matrimonial bermula sebelum membuat permohonan. Dalam keadaan sedemikian, dapatan Mahkamah

- A Tinggi bahawa perintah jagaan di bawah s. 88(1) Akta 1976 hanya boleh didapati jika ibu bapa telah memulakan prosiding matrimonial terhadap satu sama lain adalah silap.
- (3) Temuramah dengan kanak-kanak bagi menentukan pihak mana yang ia lebih suka untuk menyerahkan masa depannya memperlihatkan pilihan terus terangnya untuk tinggal dengan ibu bapa dan adik beradik kandungnya. Dalam mengeluarkan perintah yang menyentuh kebajikan dan masa depan seorang kanak-kanak, mahkamah peka bahawa pertimbangan utamanya adalah kebajikan kanak-kanak itu sendiri. Dalam kes semasa, kanak-kanak telah tinggal dengan keluarga kandungnya sejak satu setengah tahun yang lalu dan, walaupun responden hanyalah seorang penjual roti, tiada apa yang menunjukkan bahawa beliau tidak mampu menanggung isterinya yang tidak bekerja serta keempat-empat anaknya yang masih bersekolah tersebut.
- (4) Responden adalah bapa kandung kanak-kanak dan sewaktu beliau berpisah dengan kanak-kanak pada tahun 1994 dan membenarkan perayu membela dan menjaga budak tersebut, ia adalah dengan kepercayaan yang amat tebal, walaupun tidak berasas, bahawa perayu akan berjaya mengandungkan anaknya sendiri. Oleh itu, penyerahan kanak-kanak kepada perayu tidaklah bersifat muktamad. Ini juga jelas jika dilihat kepada fakta bahawa tiada percubaan dibuat oleh perayu untuk mengambil kanak-kanak sebagai anak angkat secara formal di bawah undang-undang. Oleh kerana lebih 11 tahun telah berlalu tanpa perayu berjaya mengandungkan anaknya sendiri, maka adalah sesuai dan wajar bahawa kanak-kanak dikembalikan kepada ibu bapa kandungnya bagi membolehkannya menjalani kehidupan yang lebih bermakna, dengan limpahan kasih sayang ibu bapanya serta ditemani adik beradiknya sendiri.
- (5) Berdasarkan pertimbangan-pertimbangan di atas dan mengambilkira hakikat bahawa perayu tidak berhak di sisi undang-undang untuk memaksa responden mengembalikan kanak-kanak kepadanya, maka rayuan ditolak dengan kos dan deposit hendaklah dibayar kepada responden sebagai penyelesaian terakhir dan muktamad kosnya.
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Case(s) referred to:

R Saraswathy v. R Palakrisnan [1986] 2 MLJ 127 (*foli*)

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Legislation referred to:

Guardianship of Infants Act 1961, ss. 2, 3, 5, 11

Law Reform (Marriage and Divorce) Act 1976, s. 88(1)

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For the appellant - Ng Aik Beng; M/s AB Ng & Assoc
Respondent in person

[Appeal from Court of Appeal; Civil Appeal No: 02-211-2005]

Reported by Suresh Nathan

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JUDGMENT

Siti Norma Yaakob CJ Malaya:

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[1] In this appeal, five questions of law have been posed to us for our determination. In substance those questions as expressed in Bahasa Malaysia read as follows:

(1) Sama ada Seksyen 88 (1) Akta Memperbaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 terpakai kepada ibu bapa peliharaan (foster parent) seperti perayu yang memelihara kanak-kanak selama 11 tahun untuk memohon perintah kustodi;

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(2) Sama ada Seksyen 88 (1) Akta Memperbaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 hanya terpakai apabila wujudnya prosiding penceraian seperti diputuskan oleh Hakim Mahkamah Tinggi Melaka walaupun bercanggah dengan keputusan Mahkamah Agung dalam kes *R Saraswathy v. R Palakrishnan* [1986] 2 MLJ 127;

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(3) Sama ada Seksyen 2, 3 dan 11 Akta Penjagaan Kanak-kanak 1961 tidak mempunyai undang-undang prosedur dan substantif tentang isu kustodi melainkan permohonan deklarasi untuk hak guardianship dipohon oleh Perayu dalam Saman Pemula sepertimana diputuskan oleh Hakim-hakim Mahkamah Rayuan;

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(4) Sama ada Seksyen 2, 3 dan 11 Akta Penjagaan Kanak-kanak 1961 tidak terpakai kepada ibu bapa peliharaan (foster parent) seperti perayu yang memelihara kanak-kanak selama 11 tahun untuk memohon perintah kustodi sepertimana diputuskan oleh Hakim Mahkamah Tinggi Melaka;

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- A** (5) Sama ada undang-undang kes *Masam v. Salina Saropa & Anor* [1974] 2 MLJ 59 dan *Arumugam s/o Seenivasagam v. Sinnamah (f)* [1959] 25 MLJ 130 masih menjadi undang-undang yang baik tentang hak ibu bapa peliharaan (foster parents) untuk memohon hak penjagaan di Malaysia.
- B** [2] The dispute in this appeal is very much a family dispute and is centered on the right to the custody of a twelve year old minor, Lishalina (“the child”) who is the daughter of the respondent.
- C** [3] The appellant is a younger sister of the respondent and as such the child is her niece.
- D** [4] Although the appellant has been married for over fifteen years, she has never been blessed with a child of her own. Her married brother, the respondent is luckier than her in that he had fathered four children, of whom the child is one. She was born on 21 January 1994 and ranks as the third child amongst her siblings of two brothers and a sister.
- E** [5] It is not disputed that when the child was only 3½ months old, the respondent had surrendered the care and custody of the child to the appellant in the belief and hope that by taking care of the child, the appellant would be able to conceive a child of her own.
- F** [6] That was not to be, and in any event, for well over eleven years, the appellant showered her love and affection on the child, fed and clothed her, provided for her health care and good education and treated her as if she was her own child.
- G** [7] Trouble however emerged when the appellant and her husband took the child to Jitra, Kedah, to meet with the child’s natural parents and siblings during the Deepavali celebration of 2004. At the end of the visit, the child was persuaded to stay back with her family with a promise that she would be returned to the appellant. She never did so and to enforce her parental rights, the appellant turned to the courts seeking a number of reliefs the practical effect of which is to restore the custody of the child to her.
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- I** [8] In dismissing the appellant’s application for custody, the High Court made the following findings.

(1) In her capacity as a guardian, the appellant cannot claim under ss. 2, 3, 5 and 11 of the Guardianship of Infants Act 1961 (“the 1961 Act”) to have a superior right of custody of the child to the exclusion of the respondent, the child’s natural father.

(2) A custody order under s. 88(1) of the Law Reform (Marriage and Divorce) Act 1976 (“the 1976 Act”) can only be obtained against a “child of the marriage” where the parents have commenced matrimonial proceedings against each other which, *inter alia*, seeks an order for custody. As such the disputants before the court must be the natural parents of the child. As the appellant is not the natural parent of the child, she cannot take advantage of s. 88(1).

[9] The Court of Appeal agreed with the findings of the High Court and in dismissing the appellant’s appeal had this to say on s. 88(1) of the 1976 Act.

We do not see the relevance of any of the provisions in the 1976 Act *vis-à-vis* the instant proceedings. The 1976 Act, according to its preamble, is “An Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide matters incidental thereto.” What is obvious to us is that the word “child” appearing in sections 88 and 90 refers to a child of the marriage. The provisions of the 1976 Act surely cannot at all be applicable to the instant proceedings. The dispute here does not relate to a matrimonial dispute between parties to a marriage.

As for the appellant’s reliance on the relevant provisions of the 1961 Act, the Court of Appeal expressed its view in the following manner.

We are of the view that the appellant does not at all fall within the contemplation of the word “guardian” under the provisions of the Act. We are also of the view that the appellant’s application does not at all fall within any of the provisions of the Act. L have parents who are still living and they seem to be happily married. The appellant has never been appointed as guardian of L by her parents pursuant to the provisions of any written law.

[10] ‘L’ referred to by the Court of Appeal is the child.

[11] The judgment ended with the following words.

- A** In the instant proceedings, the respondent had never abandoned L to the care of the respondent. She is now living with her immediate family and will grow up with her brothers and sister and with her natural parents. There is nothing to show that L's parents are unsuitable to take care of L. The court is primarily concerned with the welfare of L and not with the welfare of the parties to the dispute.
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[12] Before us, Mr. Ng Aik Beng, learned counsel for the appellant chose to submit on the provisions of s. 88(1) of the 1976 Act to support his contention that the word 'relative' appearing in that sub-section empowers us to grant a custody order to the appellant in her capacity of a foster parent. He contended that there are exceptional circumstances to warrant the making of such an order.

- D** **[13]** Section 88(1) contains the following provisions.

- 88(1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.
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- [14]** The introductory words "The court may at any time by order" in the sub-section is a giveaway in that there must be a pending custody battle between the parents of a child and that the court is asked to determine which parent has the better right to custody at the expense of the other. The subject matter of the dispute is the child of the marriage which under s. 2 of the 1976 Act is defined to include a child legally adopted by either of the warring parties before the court.
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- [15]** It is when the court finds that the responsibility of custody cannot be given to either parent due to the exceptional circumstances prevailing in any given case that the court turns to a relative to whom custody can be entrusted.
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- [16]** The factual matrix of the instant appeal does not fall within the framework of the sub-section. The custody battle is not between the natural parents of the child but between her aunt and her father. The appellant cannot claim to fit into the shoes of a parent as the 1976 Act makes no provision as to the custodial right of a foster parent which the appellant claims to be. For that very reason, we had answered Question (1) posed to us in the negative.
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[17] As for the timing of the custody application, it can be applied for by either parent at any time under s. 88(1) and this is confirmed by the case of *R Saraswathy v. R Palakrisnan* [1986] 2 MLJ 127. The applicant parent need not wait for matrimonial proceedings to commence before the application is made. To that extent the finding of the High Court Judge that a custody order under s. 88(1) can only be obtained where the parents have commenced matrimonial proceedings against each other is erroneous. That is the reply we give to Question (2).

[18] The Court of Appeal had also dealt at length with the issue as to whether the appellant was a guardian within the meaning of the 1961 Act, to entitle her to claim interim custody of the child. In so doing, it made reference to ss. 2, 3 and 11 and concluded that from the affidavit evidence the respondent had not appointed the appellant a guardian of the child to entitle the appellant to come within the relevant provisions of the 1961 Act. As we consider that the Court of Appeal had not made any finding in the manner expressed by Question (3), we had declined to answer the question posed.

[19] Question (4) seeks our confirmation whether the High Court was correct when it found that the appellant cannot seek the protection of ss. 2, 3 and 11 of the 1961 Act to maintain her claim for custody as a foster parent. This is so as the provisions of the relevant sections are concerned with the rights and authority that are vested in a child's father and mother and not to a third party like the appellant. We see nothing wrong with the judge's finding on this issue and therefore merits no answer from us.

[20] We had also declined to answer Question (5) as the two cases cited speak for themselves based on the facts peculiar to each case.

[21] We now came to the crux of this appeal. As we had asked the child to be present during the hearing before us, we took the liberty of interviewing her in the privacy of our chambers and in the absence of the appellant and the respondent. We felt that at the age of 12, she would be in a position to voice her preference and since she had not been interviewed by either the High Court or the Court of Appeal, we felt that her input would make that difference as to the decision that we should arrive at in these proceedings.

- A** [22] She came across as a confident young girl, spoke well and appeared to be quite unfazed by the attention drawn to her following the conflict between her aunt and her father. As the purpose of the interview was to ascertain which party she preferred to spend her future life with, she candidly chose to be
- B** with her parents and siblings.

[23] In issuing an order effecting the welfare and the future of a minor, a court is mindful of the well entrenched principle of law that the principal consideration is the welfare of the minor.

- C** [24] The child has been living with her parents and siblings, aged 18, 15 and 11 for the past 1½ years in Jitra, Kedah. She attends the local government school and at the end of this year she will be sitting for her Standard 6 Government Examination. Although
- D** the respondent is a bread seller, there is nothing to suggest that he is unable to support his non-working wife and his four school going children.

- E** [25] It must not be forgotten that the respondent is the natural father of the child and when he parted with her in 1994 and allowed the appellant to nurture and care for the child, it was with the fervent belief, however misguided, that the appellant would be blessed with an issue of her own. As such the surrender of the child to the appellant lacked the element of permanency. This is also borne out by the fact that no attempt was made by the
- F** appellant to formally and legally adopt the child. As more than eleven years have passed and she has yet to conceive a child of her own, it is only right and proper that the child be returned to her natural parents where she will be able to lead a more fulfilled life surrounded by the love and affection of her own parents and
- G** the companionship of her own siblings.

- [26] Based on those considerations and that the appellant had no right in law to force the respondent to return the child to her, we had dismissed her appeal with costs and ordered that the
- H** deposit be paid out to the respondent in full and final settlement of his costs.

- [27] Both my learned brothers, Arifin Zakaria, FCJ, and Nik Hashim Nik Ab. Rahman, FCJ, who had sight of this judgment in draft concur with the reasons given for dismissing this appeal with
- I** costs and the consequential order made therein.
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